



Office of the Attorney General

State of Texas

September 25, 1992

DAN MORALES

ATTORNEY GENERAL

Mr. Michael Anthony Moss
Assistant City Attorney
City of Houston
Legal Department
P. O. Box 1562
Houston, Texas 77251-1562

OR92-573

Dear Mr. Moss:

On behalf of Southwestern Bell Telephone Company ("SWBT"), you seek a reconsideration of Open Records Letter 92-468 (1992), in which we held that certain information submitted to the City of Houston (the "city") was not a trade secret and thus not entitled to protection under section 3(a)(10) of the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request for reconsideration was assigned ID# 17169.

The city received on February 26, 1992 a request for the following information:

1. A copy of the current municipal franchise Ordinance which grants Southwestern Bell Telephone Company ("SWBT") the right to use your public property,
2. The municipal franchise audit including workpapers or any formal or informal report including workpapers involving SWBT which either directly or indirectly influenced the Ordinance in the above,
3. A copy of all previous franchise Ordinances involving SWBT which originated after 1990.

Previously you advised us that the requestor has been provided with information responsive to the first and third items of the request. With respect to the second item, you have submitted to us for review an internal audit of SWBT's franchise with

the city including related correspondence and memorandums (Exhibit C). Pursuant to section 7(c) of the Open Records Act, SWBT has submitted to us for consideration arguments in which it asserts the section 3(a)(10) exception with respect to franchise revenue figures submitted to the city auditor. Because SWBT does not comment on the remainder of the information requested in the second item, we will confine our reconsideration of Open Records Letter 92-468 to the availability of the revenue figures and presume that the remaining information has been or will be made available to the public.

In its initial brief submitted to us for consideration pursuant to section 7(c) of the Open Records Act, SWBT claimed that the requested information was excepted from required public disclosure under the "commercial or financial information" branch of section 3(a)(10). Because neither the city nor SWBT demonstrated that the requested information constitutes trade secrets or is "privileged or confidential" under the common or statutory law of Texas, *see* Open Records Decision No. 592 (1991) (copy enclosed), we concluded in Open Records Letter 92-468 that the requested information was not "commercial or financial information" entitled to the protection of section 3(a)(10) of the Open Records Act.

In the arguments submitted to us requesting reconsideration of Open Records Letter 92-468, SWBT does not reassert its claim that the requested information is "commercial or financial information" within the meaning of section 3(a)(10). Accordingly, we need not reconsider this aspect of Open Records Letter 92-468. However, SWBT now asserts that the revenue figures at issue here are excepted from required public disclosure by section 3(a)(10) because they constitute trade secrets.

The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757, which holds a trade secret to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2 (copy enclosed). The

Restatement lists six factors to be considered in determining whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939). These factors are indicia of whether information, including customer lists, constitutes a trade secret; depending on the information being considered, one factor alone may be indication of a trade secret. *See Open Records Decision Nos. 552 at 3; 494 (1988) at 3 (citing Expo Chemical Co. v. Brooks, 572 S.W.2d 8 (Tex. Civ. App.--Houston [1st Dist.] 1978), rev'd on other grounds, 576 S.W.2d 369 (Tex. 1979)).*

In addressing the Restatement criteria, SWBT advises us that the city specific revenue figures were supplied to the city only for purposes of its audit of SWBT's franchise and that city specific revenue figures are supplied to other cities only for purposes of verifying payment of franchise fees. SWBT also states that such information is shared within SWBT itself only among the employees who compiled and transmitted the revenue figures; these employees are subject to disciplinary action including dismissal should they make the information public. Release of the requested information, SWBT also contends, would allow competitors "to gauge the degree of their market penetration for purposes of developing competitive strategies against Southwestern Bell's service." Finally, SWBT advises that the revenue figures

were compiled at "substantial" expense to SWBT and that it would be virtually impossible for a competitor to duplicate them.

We have considered SWBT's arguments and have examined the documents submitted to us for review. SWBT has made a *prima facie* case for its city specific revenue figures as a trade secret, and the city must withhold the revenue figures pursuant to section 3(a)(10) of the Open Records Act. See Open Records Decision No. 552 at 5. The remaining information, however, must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-573.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/GCK/lmm

Enclosures: Open Records Decision Nos. 592, 552
Open Records Letter 92-468

Ref.: ID# 17169
ID# 17227
ID# 17274

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